Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-853

ANTOINE WADIEH ELIAS, ROSE ELIAS, CAROL MARIE ELIAS by next friend and father, ANTOINE WADIEH ELIAS, CLAUDETTE PAULINE ELIAS by next friend and father ANTOINE WADIEH ELIAS, FAHIMA ABDEL MESSIH SAFAR, all citizens and residents of Chicago, Cook County, Illinois, and LOUIS TAZBAZIAN, a citizen and resident of Montreal, Canada,

Plaintiffs-Petitioners,

vs.

A & C DISTRIBUTING COMPANY, INC., a Tennessee Corporation licensed to do business in the State of Tennessee, and, its agent, servant and employee, GERETT LEE JOHNSON, a citizen and resident of Nashville, Davidson County, Tennessee,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BERNARD M. ROSENBLUM
LEVINE & ROSENBLUM
18th Floor, Life & Casualty Tower
Nashville, Tennessee 37219
615-244-4944
Attorney for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED

Petitioners' statement of the questions presented does not give a fair representation of the issue raised by the record of proceedings below. The question which was certified to the Court of Appeals of Tennessee is set out

at page 3a of the Petition. In view of the decisions below to the issue thus raised, the question presented for review is whether the State of Tennessee may, consistent with the Full Faith and Credit clause, the rights guaranteed by the Privileges and Immunities, Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, hold that the commencement of an action in a foreign state court does not toll the running of the Tennessee Statute of Limitations against an action for the same cause and between the same parties subsequently filed in Tennessee, when Tennessee is both the forum state and the state where the cause of action arose.

STATUTES

Tennessee Code Annotated, Section 28-304:

> "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued. . . ."

STATEMENT OF THE CASE

Conspicuous by its absence in petitioners' statement of facts is the fact that the automobile accident out of which this action arises took place in Nashville, *Tennessee.*

A full statement of all of the facts material to the consideration of the question presented in the petition

is found in the opinion of the Court of Appeals of Tennessee set out in pages 2a through 6a of the Petition.

The federal question raised by petitioners was not timely and properly raised in the Court of first instance and in the Appellate Court so as to give this Court jurisdiction to review the judgment on Writ of Certiorari. Petitioners candidly state that they are raising the Constitutional issues presented for the first time in this Petition. (Petition, p. 6) Petitioners further candidly recognize that this Court has repeatedly held that federal questions are not timely raised when first raised in a jurisdictional statement or notice of appeal to the Supreme Court. (Petition, p. 6)

Petitioners argue that the "peculiar circumstances of this case" justify the application of an exception to the rule in that petitioners claim that the decision of the Court of Appeals for the State of Tennessee was utterly unexpected.

Petitioners omit mention of the 1957 decision of the United States District Court for the Eastern District of Tennessee in *Sigler v. Youngblood Truck Lines,* 149 F. Supp. 61, wherein the Tennessee Saving Statute was construed exactly as construed by the Tennessee appellate courts in the instant case. (Petition, pp. 8a, 9a) Further, petitioners omit mention of the general rule, as stated in *Corpus Juris Secundum* and *American Jurisprudence,* in accord with the holdings of the Tennessee Supreme Court. 54 C.J.S. §288-c, §299; 51 Am. Jur. 2d §201, §306. (Petition, pp. 9a, 10a) Thus, the "peculiar circumstances" in which petitioners claim the decision of the Tennessee appellate courts to have been "utterly unexpected" do not justify the application of an exception to the rule that the federal question be timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR DENYING THE WRIT

The Tennessee Supreme Court has decided the issue raised in this case in a way which is fully in accord with applicable decisions of this Court as well as being fully in accord with the decisions of the courts of last resort in other jurisdictions which have ruled on the precise issue raised. Thus, there are no special and important reasons for further review on writ of certiorari.

I.

Applicable Law

The automobile accident out of which this claim arises occurred in Nashville, *Tennessee*. The defendants are residents of Tennessee, and the plaintiffs are residents of Illinois, with the exception of plaintiff Tazbazian who is a resident of Canada. (Petition, pp. 3a, 4a).

In view of the fact that Tennessee is both the place where tortious conduct of the defendant is alleged to have been committed, and was, in the instant case, the forum state for judicial determination of the claim, the law of the State of Tennessee determines the rights of the parties to this action. *Restatement, Conflict of Laws* (1934) §378; *Babcock v. Mapleleaf, Inc.*, 424 F. Supp. 428 (1976); *Telecommunications, Engineering Sales and Service Co., Inc. v. Southern Tel. Supply Company,* 518 F. 2d 392 (1975). Further, it is a well established rule that the forum state is permitted to apply its own period of limitation, this Court having held that the Full Faith and Credit clause does not compel the forum state to use the period of limitation of a foreign state. *Wells v. Simonds Abrasive Company,* 345 U.S. 514 (1953); *Great Western Tel. Co. v. Purdy,* 162 U.S. 329 (1896); *The Bank of the United States v. Andrew Donnally,* 33 U.S. 361 (1834).

In the instant case, plaintiffs commenced their action in the courts of Tennessee twenty-three (23) months after the accident out of which this action arose. (Petition, p. 5) Plaintiffs sought to avoid the bar of the one year Tennessee Statute of Limitations (T.C.A. §28-304) by asserting the "Tennessee Saving Statute" (T.C.A. §28-1007), based upon the fact that plaintiffs had previously filed suit in the Illinois state courts which suit had been dismissed for lack of jurisdiction. (Petition, p. 5) The Tennessee Court of Appeals dismissed plaintiffs' action holding that under the Tennessee Saving Statute the commencement of an action in a foreign state does not toll the running of the Tennessee Statute of Limitations when Tennessee is the state where the cause of action arose. (Petition, p. 7a)

II.

The Full Faith and Credit Clause

Petitioners contend that "the Illinois judicial proceeding brought by these petitioners resulted in a judgment which is clearly entitled to recognition by the Tennessee courts." (Petition, p. 11) The Illinois judicial proceeding to which petitioners refer, in fact, resulted in dismissal of plaintiffs' action (Petition, p. 5) Thus, the Illinois proceedings were a nullity, and there was no judgment rendered to which recognition could be given by Tennessee courts. Petitioners argue that the decision of the Tennessee courts impairs the practical utility of long arm statutes such as that of Illinois by which petitioners sought to obtain jurisdiction of this case. However, petitioners accepted without appeal the decision of the Illinois court that the Illinois long arm statute was insufficient to confer jurisdiction in this case. (Petition, p. 5). Thus, again, the question of recognition of the Illinois long arm statute by the courts of Tennessee is not raised.

Petitioners ask this Court to engraft upon the statute of limitations of every potential forum the "saving statute", if any, of any other state in which a plaintiff originally commences suit, whether the State where the action is originally commenced has jurisdiction of the cause or not. This Court has held that such is not a requirement of full faith and credit. *Wells v. Simonds Abrasive Company, supra; Great Western Telegraph Company v. Purdy, supra; The Bank of the United States v. Andrew Donnally, supra.*

As was held in *Wells v. Simonds Abrasive Company, supra*:

> "The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states. . . . Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." 345 U.S. 514, at 517.

Petitioners cite this Court's decision in *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965) as authority for petitioners' proposition that the decisions of the Tennessee Courts in the instant case are not in accord with applicable decisions of this Court. It should be noted that unlike the instant case, and unlike the issue raised in the instant case, the *Burnett* case involved a *federal* limitations statute in the Federal Employers' Liability Act, rather than the statute of limitations of a State. This Court's decision in that case rested upon the determination of the intention of Congress in the enactment of that legislation. It thus rests upon wholly different principles and issues than the question presented in the instant case.

Petitioners further argue (Petition, pp. 11, 12) that the decisions of the various States are divided upon the issue raised herein, and that this Court should therefore

rule on the issues in order to "bring order from the chaos which presently exists". Respondents submit, contrary to petitioners' contentions, that no such chaos exists, and that, in fact, the decisions in the state courts on the issue raised are consistent and uniform. The general rule applicable to the issue raised herein is that an action in a foreign state does not toll the running of the Statute of Limitations in the state where the cause of action arose. 54 C.J.S. §288-c, §299; 51 Am. Jur. 2d §201, §306. (Petition, pp. 9a, 10a) No jurisdictions have deviated from the general rule set out above when addressing the specific issue set forth in this case. To the contrary, state or federal courts in twelve states have addressed the specific issue presented, and all have held in accordance with the general rule.[1]

Authorities cited by petitioners (Petition, p. 12, footnote 2) as having held contrary to the general rule are all distinguishable in that they have not addressed the specific issue involved in the instant case or have saving statutes differing from the Tennessee statute involved herein. Some of those states have addressed the interpretation of their saving statute only in the context of cases

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1. Delaware: *Sorenson v. Overland Corporation*, 142 F. Supp. 354 (1956); Kansas: *Jackson v. Prairie Oil and Gas Compnay*, 115 Kan. 386, 222 P. 1114 (1924); Mississippi: *C&L Rural Electric Cooperative Corporation v. Kincade*, 175 F. Supp. 223 (1959); New York: *Baker v. Commercial Travelers Mutual Accident Association*, 161 N.Y.S. 2d 332 (1957); North Carolina: *High v. Broadnax*, 271 N.C. 313, 156 S.E. 2d 282 (1967); Ohio: *Howard v. Allen*, 30 Ohio St. 2d 130, 283 N.E. 2d 167 (1972) and *Andrew v. Bendix Corporation*, 452 F. 2d 961 (1971); Oklahoma; *Herron v. Miller*, 96 Okla. 59, 220 P. 36 (1923) and *Estate of Tuckman v. Estate of Cottle*, 175 F. 2d 775 (1949) and *Morris v. Wise*, 293 P. 2d 547 (1955); Pennsylvania: *Overfield v. Pennroad Corporation*, 146 F. 2d 889 (1944); Tennessee: *Elias v. A&C Distributing Co., Inc.*, ... S.W. 2d ..... (1979) and *Sigler v. Youngblood Truck Lines*, 149 F. Supp. 61 (1957); Texas: *Scurlock Oil Company v. Three States Contracting Company*, 272 F. 2d 169 (1959); West Virginia: *Hull's Administrator v. Hull's Heirs*, 35 W.Va. 155, 13 S.E. 49 (1891) and *Stare v. Pearcy*, 401 F. Supp. 994 (1957); Wyoming: *Riley v. Union Pacific Railroad*, 182 F. 2d 765 (1950).

in which the cause of action arose in a foreign state, thereby necessitating the importation of law foreign to the forum, under the conflict of laws principles.

The Tennessee appellate courts having decided the issue in this case in accord with applicable decisions of this Court, and there being no confusion among the States on this issue, respondents submit that the Tennessee saving statute, as interpreted by the courts of that state, do not violate the full faith and credit clause, and no further review by this Court is warranted.

III.

Privileges and Immunities, Due Process of Law, Equal Protection of the Law

Petitioners contend that the Tennessee Saving Statute, as interpreted by the courts of that state, violates the rights to privileges and immunities, due process of law, and equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution. This Court has held otherwise. *Canadian Northern Railway Company v. Eggen,* 252 U.S. 553 (1919); *McKnett v. St. Louis and San Francisco Railway Company,* 292 U.S. 230 (1934); *Chase Securities Corporation v. Donaldson,* 325 U.S. 304 (1945).

The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *McKnett, supra.*

As stated in *Canadian Northern Railway Company, supra,* "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection." (252 U.S. 553, at page 562).

In the instant case, petitioners are not being treated by the courts of Tennessee differently than the Tennessee courts would treat a Tennessee citizen who had not met the statutory required conditions precedent to the application of the Tennessee Saving Statute, namely, having commenced or attempted to commence an action in the State of Tennessee within the statute of limitations.

Petitioners concede (Petition, p. 14) that the Tennessee statute of limitations affords both the resident and non-resident the same period of time in which to sue. Petitioners claim however, that it is not the statute of limitations, but rather the saving statute, which they challenge. Yet, the saving statute too applies equally to residents and non-residents.

In the *Canadian Northern Railway Company* case, *supra,* this Court was faced with a similar argument regarding a Minnesota statute of limitations. This Court stated:

> "The laws of Minnesota gave to the non-resident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year, - as long a time as was given him for that purpose by the laws under which he chose to live and work, - and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate, and the statute is a valid law." 252 U.S. 553, at page 563.

It is submitted that petitioners' predicament is not the product of unconstitutional discrimination, nor denial of due process of law, but is the sole product of petitioners' failure to comply with the laws of the forum to which they presented their case.

CONCLUSION

There are no special and important reasons why the writ of certiorari should be granted in this matter in that the Tennessee state courts have acted in accord with applicable decisions of this Court, there are no constitutional infirmities in the Tennessee Saving Statute as construed by the courts of that state, and there is no lack of consistency in the authorities on the issue presented. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD M. ROSENBLUM
LEVINE & ROSENBLUM
18th Floor, Life & Casualty Tower
Nashville, Tennessee 37219
615-244-4944
Attorney for Respondents